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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

STATE OF ARIZONA, Plaintiff, vs. JOSEPH DOUGLAS ROBERTS, Defendant.	CR 2010-00047 RESPONSE TO DEFENDANT'S MOTION TO DISMISS (Honorable Donna J. Grimsley)

The State of Arizona, by undersigned counsel, has reviewed the transcripts of the preliminary hearing, as well as the Defendant's Motion to Dismiss. The motion was filed in Justice Court after the first day of the hearing, but before the second day. While the Motion itself does not appear to have been filed since the case was bound over to Superior Court, the Defendant's Rule 5.5 Motion certainly incorporates the Motion to Dismiss and expresses the valid intention that the merits of the Motion be litigated.

Due to the limitations inherent in the process of the preliminary hearing, it is the position of undersigned counsel that the Rule 5.5 Motion is not the proper remedy for an allegation of

prosecutorial misconduct. The allegations of misconduct should be addressed in a separate motion. Dismissal of an indictment with prejudice on the grounds of prosecutorial misconduct is rare. United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); State v. Young, 149 Ariz. 580, 720 P.2d 965 (App. 1986). Therefore, undersigned counsel is responding to those concerns in this separate Response. However, if the State's position is incorrect, then the State requests leave to incorporate this Response into the State's Response to the Rule 5.5 Motion, filed this same date.

The Motion to Dismiss is based on a mischaracterization of the Arizona Court's decision in the Warner case. Warner was limited to an invasion of attorney-client communications, finding that the right to counsel must include the right to privileged, unfettered communication; a police invasion of privileged communication might or would create a chilling effect in the attorney-client relationship. The facts in the case at bar do not approach the parameters of the Warner decision because this case does not include attorney-client communications; Warner simply does not apply. Further, the 2009 U.S. Supreme Court Montejo decision allows the acts performed by the investigators in this case.

The Motion to Dismiss is not supported by the evidence and the law and therefore should be denied. This Response is supported by the attached Memorandum.

Submitted September 3, 2010.

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY

By /s/
/s/ John F. Beatty
Deputy Maricopa County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

As the Court is aware, on February 5, 2010, at what turned out to be the end of the first day of the preliminary hearing, defense counsel verbally requested a continuance of the hearing so he could file a written motion to dismiss based on prosecutorial misconduct. RT, 2/5/10, pp. 49-52.

On March 1, 2010, the defense filed the written Motion to Dismiss in the Round Valley Justice Court. On March 3, 2010, the Justice Court magistrate ruled by Minute Entry that the Motion to Dismiss was filed prematurely, thus obviating the need for the State to respond to the merits of the Motion.

On March 19, 2010, the second day of the hearing was conducted. At the beginning of that hearing, there was further discussion of the Motion to Dismiss, at which time the magistrate affirmed her earlier finding that she had no jurisdiction to address the issues. RT, 3/19/10, pp. 5-7. At the end of the presentation of evidence and offer of proof, the magistrate bound over the charges to Superior Court. RT, 3/19/10, p. 43.

II. FACTS

Undersigned counsel concedes that defendant Roberts has been represented by counsel (Mr. David Martin) since the inception of the charges in the case a year ago, and that the prosecutor's office was aware of this fact long before February 4, 2010. During his testimony, investigator Hounshell acknowledged that he knew Roberts had a lawyer. RT, 2/5/10, p. 41.

A. The ACAO Meeting

There was a conversation among members of the Apache County Attorneys Office ("ACAO") on or prior to February 4 regarding whether it would be legally permissible for investigators of the ACAO to meet with Roberts in jail on February 4 without the knowledge or

consent of defense counsel. RT, 2/5/10, p. 36ff.

Investigator Hounshell had approached and asked the prosecutors if he could go to the jail and speak to the defendant. RT, 2/5/10, p. 36, line 11. Mr. Brannan, the State's then-prosecutor, told him that if Hounshell were to talk to him, he would first have to advise him of his *Miranda* rights. RT, 2/5/10, p. 37, line 8. Specifics of the ACAO meeting also included a discussion of the State's plea offer and the preliminary hearing (RT, 2/5/10, p. 40, line 2), as well as the alleged fact that defense counsel thought the defendant should waive the preliminary hearing (RT, 2/5/10, p. 40, line 9). Hounshell found out during this meeting that the defense attorney allegedly wanted to waive the preliminary hearing, but the defendant did not want to waive it. RT, 2/5/10, p. 45, line 22, and p. 46, line 9.

B. The Jail Meeting With Roberts

Hounshell acknowledged that Roberts' attorney was not present at the jail during the meeting and that Hounshell did not try to contact Roberts' attorney. RT, 2/5/10, p. 41. He and another investigator met Roberts at the jail where Roberts was being housed. He advised Roberts of his *Miranda* rights at the beginning of their talk, and Roberts said very little. RT, 2/5/10, p. 49, line 6. Hounshell testified that all statements regarding Roberts' lawyer had to do with Roberts' ability to contact his lawyer and whether he wanted to do so, not the content of any conversations between Roberts and his lawyer. RT, 2/5/10, p. 43. He did not ask about the defenses or defense witnesses. RT, 2/5/10, p. 45, lines 8 and 13.

Hounshell said he was motivated to have the discussion because he felt Roberts had not been given "all the information on the deal we offered with the evidence we had." RT, 2/5/10, p. 45, line 4 (*see also*, RT, 2/5/10, p. 41, line 5, and p. 48, line 21). He said he was not there to intimidate Roberts, nor to extract a confession, and that he never interviewed Roberts about any

crime. RT, 2/5/10, p. 49.

C. Transcript of the jail meeting's recording

The jail meeting was recorded. RT, 2/5/10, p. 43. Undersigned counsel is unaware if there has been a formal transcription done of the interview. The ACAO's original Response, dated May 7, 2010, contains the following transcription of the meeting:

HOUNSHELL: Joe Roberts?

ROBERTS: Yeah.

BH: Hi, my name is Brian Hounshell. I'm an investigator with the Apache County Attorney's Office.

JR: Uh hum.

BH: This is Jerry Jaramillo, he's my partner. He's an investigator as well.

JR: Uh hum.

BH: We need to cover a couple of things with ya and, I understand that you have court tomorrow. But before we talk to you, I'm going to read you your rights so you understand that you have rights. You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney to assist you prior to questioning, to be with you during questioning if you so desire. If you can't afford an attorney, you have the right to have an attorney appointed prior to questioning. Do you understand your rights?

JR: Uh hum.

BH: Is that a yes?

JR: Yes sir.

BH: OK. We're not here to question you about the charges that are currently against you. I'm here to explain a couple of things about court. To start with, today is 2/4; February 4, 2010, and we are at the Apache County Jail, it's uh, 11:10 hours. We are in the attorney-client room. Just want to make sure that's on because we are recording this. Tomorrow you're scheduled for a Preliminary Hearing.

JR: Uh hum.

BH: On, on your case. Um, I've been working on this case since the very beginning. I don't know if you, if you know me or ever met me, I don't think I have. I've looked over most of the case. I definitely know Inmon and Johnson. Your Prelim

is scheduled tomorrow. I just want to make sure that understand what's going to happen tomorrow.

JR: Uh huh.

BH: Um, you have an option to go to Preliminary Hearing. You have an option to waive it tomorrow. If we go to Preliminary Hearing tomorrow, it will be a tougher road for you. What I mean by that is, right now they've made some offers to you about doing 25 years, not getting a life sentence. This could be possibly handed down by a judge if you are convicted. That we are not going to seek a death penalty against you. There are benefits for you by not going to Preliminary Hearing. And the benefits will be discussed before your Preliminary Hearing starts if you choose to still go through and have one tomorrow. But I want you to understand that, that right now, they're willing to offer you 25 years. K? And like I said, I work mainly on Inmon's case. And uh, I was present when they interviewed you. The three times they talked to you, I watched the interviews, live, while they talked to you. Inmon will probably be sentenced to 25. So, you, by not entering into a deal or at least entertaining the thought of what they are offering you on the 25 years right now, potentially you could more time than Inmon. You could do a life sentence. A natural life sentence. You could possibly, they could possibly seek the death penalty. So those are things that you need to understand if you go forward, and I want you to understand that Preliminary Hearing is a probable cause hearing. Do you understand what that means?

JR: Uh huh.

BH: I will be there to testify on behalf of the State on what Inmon told me, what you said about Achten, and when the removal of the body from the motor home. You know, your wife being there. Inmon being there. You being there. The next interview with Scruggs where you were kind of involved, you know, where "he took my gun," blah, blah, blah, and you know, "he shot his gun." Then the final interview, I was working, if you remember back, on that interview, there is a lot of breaks in between on that interview at the jail, I mean at the Sheriff's Office, earlier, when you wanted to talk to the detectives about, about uh, that Rabbi in Phoenix with.

JR: Uh huh

BH: So, you remember breaking in that interview a lot? Well, that was because I was working with them on that interview where you admitted to shooting the gun at Stoney. So, the evidence is there for the Preliminary Hearing, and it will pan out tomorrow one way or the other. Um, we feel very confident that we will bind you over with no problem. If you are interested in working any type of a deal before we go to Preliminary Hearing, you need to contact your attorney today so you can work it out with them. If not, it's your decision to move forward, but we're going to mention to the judge, on, on, on the record before the Preliminary Hearing that

we offered you 25. And, and that's coming off the table. And we could seek natural life, or the death penalty. I just want you to know that, I want to be upfront with you, to make sure you understand that that might happen, if we go through with the Preliminary Hearing. Now, on the other hand, if you still want to go forward, it's entirely up to you. As far as your wife, I understand she had a baby.

JR: Nuh uh.

BH: Or, didn't her baby, I, I, I have no idea what happened there. Did she have her baby?

JR: Nuh uh

BH: Cause, wasn't she pregnant?

JR: Uh huh.

BH: Did she miscarriage?

JR: Uh huh.

BH: I didn't know that. Are you still, are you legally married to her Joe?

JR: Yes I am.

BH: Are you guys still communicating, and everything?

JR: Yeah.

BH: K, well I, I'm . . . condolences. See, I don't, that's what I'm saying, I don't know much about your case, I'm sorry you guys lost the baby. We haven't charged your wife yet. OK? Um, we've charged Mrs. Johnson. I don't know if you heard, she's in here, for hindering, for lying to us about, about the death of Ricky Flores. And, your wife was given the same opportunity to come forward when we picked you up that day, and she denied any involvement in, I mean, about Achten, she was there, by your admission and by Inmon's admission. So that's, that's another situation that you may be dealing with at a later date. It's just that we have had so many cases, and so much going on, and we just put Melissa Johnson back in a no bond. Her original charge was a Hindering. So the investigation is still ongoing. But I want you to know if we go through Preliminary Hearing tomorrow, our deals are off the table. You could do more time than Willie Inmon. So, if you want to go through with it, that's your, that's your right. If you want to waive your attorney, waive the hearing, you need to get with your attorney today and let him know. You know, it's up to you, but I want you to understand what you're up against. We, if you, how old are you?

JR: 23.

BH: 23, 33, 43, 47, 48 years old, you'd be out. That's the age me and Jerry are. So there'd be life to live after you did your sentence, if you choose to do that. You'll still be in, probably reasonably in good health and live a life. But if you take the risk of a life sentence or lethal injection, if they decide to pursue the death penalty, which we have one death penalty case currently in motion in our office right now, that is something you'll have to deal with. So, you know we're not here promising you anything, we're not here trying to talk you either way, either way, because we're prepared to go to Preliminary Hearing to bind you over to Superior Court tomorrow at 1:30 or 2:00, whenever it is. We have no problem doing that. But if you want to help yourself on a deal, then you might want to get a hold your attorney and discuss a few things. Like everybody that's been involved in these cases, from Inmon to Johnson to you and Melissa. I've sat down and had the same talk with them, in a roundabout way. Some have listened, some haven't. Inmon decided to spare his life. And that's an option you have as well, if that goes through. So I just wanted you to think about what you're going to do. And make sure [inaudible] what you really want to do, cause it's your life. And if you intend to go tomorrow, then that's fine, that's your right. If you don't, then get a hold of your attorney today. And then we will talk with your attorney and try and set up some type of deal to eliminate a natural life sentence being pursued or the death penalty. It's up to you.

JR: Uh huh.

BH: I don't have anything else. You have anything Jerry?

JARAMILLO: Do you have any questions, Joseph?

JR: No.

JJ: K.

BH: OK, it is approximately 11:18 hours, we are going to go ahead and end this interview. Thanks for your cooperation.

III. ISSUES PRESENTED

The defense argues the following: The meeting on February 4 at the jail was an intrusion into the attorney-client relationship. This intrusion violated the defendant's right to counsel in such a way that this attorney-client relationship has been undermined, specifically because the defendant lost confidence in any defense attorney. The loss of confidence hampered and undermined the defendant's ability to make an offer of proof at the preliminary hearing. The defense also argues that the only remedy for this situation is dismissal with prejudice.

IV. LEGAL ARGUMENT

A. There Was No Violation

The defendant argues that State v. Warner, 150 Ariz. 123, 722 P.2d 291 (1986), shows that the State interfered with the defendant's right to counsel such that the charges against him should be dismissed with prejudice. This is misplaced reliance. The Warner case is factually and legally dissimilar to the facts in the case at bar.

The Court in Warner was concerned about the sanctity of attorney-client communications. If a client were to feel that the conversations he was having with his attorney were going to be misused or even used against him, then there would be a chilling effect on his communication with the attorney. It was the invasion into the communications that struck the Warner Court as contrary to or an invasion of the right to counsel. In Warner, jail personnel seized the defendant's documents, some of which were legal documents, including transcripts of attorney-client meetings. The seizure happened about 30 days prior to trial, and the prosecutor had the documents during that time without advising defense counsel.

In the case at bar, the defendant had not invoked his *Miranda* or *Edwards* right to counsel and had historically conducted pre- and post-arrest interviews with police officers. The investigators met with the defendant in the jail and engaged him in conversation. The conversation was recorded, as provided above. The defendant was advised of his Miranda rights at the beginning of the conversation, and the defendant said he understood his rights. There was no discussion about any communications, whether or not privileged, between the defense attorney and Roberts, no request for information in that regard and no volunteered information. The defendant heard what the investigators had to say about the plea deal, and then the investigators left. There was no delving into the attorney-client communications, and therefore

Warner simply is not applicable.

Since the 1986 decision in Warner, the law in this area has changed. In 2009, the U.S. Supreme Court handed down Montejo v. Louisiana, 129 S.Ct. 2079 (2009). In that case, police officers spoke with the defendant after he had been appointed counsel. The police in that case went much further than the police did in the case at bar because they were able to get the defendant to take a drive to locate the weapon and because during that drive, the defendant wrote an incriminatory letter to the victim's widow, which was admissible in trial. In the case at bar, the investigators merely wanted to make sure he knew about the plea offer and the effect of a preliminary hearing on that offer.

The meeting on February 4 did not violate the defendant's right to counsel. Roberts' attorney had approximately four months to prepare for the hearing, which one would assume includes meeting with his client to build the necessary trust relationship so adamantly argued in defendant's motion. The defendant did not reveal any attorney-client confidences to the investigators at the meeting, nor did he ask about where his lawyer was. At the hearing, the attorney was able to *voir dire* and cross-examine the witnesses. Further, he was able to make a relevant offer of proof.

B. The Remedy

The Warner case cites U.S. v. Morrison, 449 U.S. 361 (1981), when trying to determine what would be the best remedy, assuming there has been an invasion into attorney-client communications, which there has not occurred here. The Morrison facts actually are closer to being on point than Warner, in that police met with a represented defendant without the knowledge of the defendant's attorney. Again, they went much farther than anything alleged in the case at bar, specifically talking about the defendant's attorney and talking about the benefits

or problems the defendant would encounter by either cooperating or not. Even in that case, though, the Supreme Court said that the remedy must be tailored to the harm of the violation. The remedy imposed was not dismissal, but rather was "limited to denying the prosecution the fruits of its transgression." Morrison, 449 US at 366.

V. CONCLUSION

The defendant's Motion is not supported by the evidence or the case law. The mere fact that the police talked to him in the jail does not in any way implicate an intrusion into attorney-client communications. Further, even if there were such an intrusion, the most appropriate remedy would be to preclude from trial the information learned by the investigators in the February 4 meeting, which was nothing.

The Motion to Dismiss should be denied.

Submitted September 3, 2010.

RICHARD M. ROMLEY
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BY /s/ John F. Beatty
/s/ John F. Beatty
Deputy Maricopa County Attorney

ORIGINAL mailed/delivered
September 3, 2010, to:

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